

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ALLSTATE INSURANCE COMPANY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
ALEKA KEY-BERTHAU, LOKEIL BERTHAU, and	:	
TARIK McMILLAN,	:	
Defendants.	:	No. 2:08-cv-768

MEMORANDUM RE: JUDGMENT ON THE PLEADINGS

Baylson, J.

December 19, 2008

Allstate Insurance Company (“Allstate”) initiated this declaratory judgment action against Defendants Aleka Key-Berthau (“Key-Berthau”), Lokeil Berthau (“Lokeil”), and Tarik McMillan (“McMillan”). Allstate seeks to have this Court render a judgment on the extent of its duty to defend Key-Berthau and Lokeil in the underlying litigation brought by McMillan currently proceeding in Pennsylvania state court. Presently before this Court is Allstate’s Motion for Judgment on the Pleadings. For the following reasons, Allstate’s Motion will be granted.

I. Background and Procedural History

A. Background of the Case

Key-Berthau is Lokeil’s mother, and the two lived at 1644 Benner Street in Philadelphia, Pennsylvania. Prior to the incident at issue in the underlying litigation, Key-Berthau purchased a homeowner’s insurance policy, the Deluxe Plus Homeowners Policy AP 324-1, Policy No. 901162226, from Allstate. The provisions of the policy will be discussed in more detail below.

Around October 4, 2007, McMillan filed a civil complaint against both Key-Berthau and Lokeil in the Pennsylvania Court of Common Pleas for Philadelphia County. In the complaint, McMillan sought damages for injuries that he allegedly suffered in an incident between Lokeil and McMillan around October 14, 2005. (Underlying Compl. ¶ 5).¹

McMillan alleges that Lokeil called McMillan and arranged a meeting between the two at a nearby bar. (Underlying Compl. ¶ 5). When McMillan arrived, Lokeil allegedly told him that he had just stolen a vehicle and requested McMillan's assistance. (Underlying Compl. ¶ 6).

McMillan, however, refused to do so:

7. Plaintiff, Tarik McMillan, then told [Lokeil] that he needs to stop doing these types of acts, at which point Defendant, Lokeil Berthau, threatens to rob Plaintiff, Tarik McMillan, and grabs Plaintiff's hand.

8. Plaintiff, Tarik McMillan, pulled his hand away from Defendant, Lokeil Berthau, at which point, Defendant, Lokeil Berthau, took out a gun and fired nine (9) shots at Plaintiff, striking him seven times.

9. Upon information and belief, Defendant Lokeil Berthau, had an extensive juvenile record, with a history of being involuntarily committed under §302 of the Pennsylvania Mental Health Act.

10. Upon information and belief, Defendant, Aleka Key-Berthau, a Philadelphia Police Officer, was aware of the extensive juvenile record of her son, Defendant, Lokeil Berthau's criminal record when she purchased for, provided to, allowed access to, instructed and/or trained him how to use the gun involved in the aforementioned shooting.

11. Defendant, Aleka Key-Berthau, failed to properly supervise and control her minor child, Defendant, Lokeil Berthau.

¹ As will be discussed below, this Court must only consider those factual allegations that are in the complaint of the underlying litigation in determining whether the insurance coverage is applicable. Citations will therefore be made to the underlying complaint, which is Exhibit B to Plaintiff's Declaratory Judgment Complaint (Doc. 1). See, e.g., (Underlying Compl. ¶ 1).

12. Plaintiff, Tarik McMillan, specifically complains of the conduct of Defendant, Lokeil Berthau, in shooting him. . . .

16. As a direct and proximate result of the aforementioned acts and conduct of the Defendants, Plaintiff, Tarik McMillan, suffered injuries including, but not limited to: three fragment bullets lodged in several parts of his body, gunshot wounds to the left leg; two gunshot wounds to the right leg; two gunshot wounds to the chest; left upper lung contusion; rib fractures 5, 6, 7 and 8, severe damage and possible nerve transection to the left peroneal nerve and post traumatic stress disorder.

(Underlying Compl. ¶¶ 7-12, 16).

Speaking specifically to the acts of Key-Berthau, McMillan alleged that:

25. At the time of the aforesaid incident, on or about October 14, 2005, Defendant, Lokeil Berthau, was under the care, custody, and/or control of his mother, Defendant, Aleka Key-Berthau.

26. Any and all injuries sustained by Plaintiff, Tarik McMillan, were a direct result of the negligent, careless and reckless supervision and control by Defendant, Aleka Key-Berthau, including but limited [sic] to the following:

a. Purchasing a firearm for her son, Lokeil Berthau, a minor, with her experience as a Philadelphia police officer, and her knowledge that he had a criminal history, as well as having been involuntarily committed under §302 of the Pennsylvania Mental Health Act;

b. Obtaining, providing, allowing and/or teaching her son, Lokeil Berthau, a minor, with a history of violence and/or mental instability, to shoot a firearm with her experience as a Philadelphia police officer, and her knowledge that he had a history, as well as having been involuntarily committed under §302 of the Pennsylvania Mental Health [sic].

(Underlying Compl. ¶¶ 25-26). Following these factual allegations, McMillan's complaint claims damages for assault and battery against Lokeil and negligent supervision against Key-Berthau. The litigation is currently ongoing in the Court of Common Pleas of Philadelphia County, October Term, 2007, Case No. 000667. In anticipation of the current dispute, Allstate

has provided Key-Berthau with counsel under several reservation of rights letters; Allstate, however, disclaimed coverage for Lokeil and refused to provide him counsel.

On February 15, 2008, Allstate instituted this declaratory judgment action in order to clarify its rights and obligations under the policy to defend both Lokeil and Key-Berthau in the underlying litigation. (Doc. 1). McMillan was the only defendant to answer the complaint. (Doc. 5). On July 2, 2008, after Key-Berthau and Lokeil both failed to make an appearance in the matter, Allstate requested, and was granted, an entry of default against both of those defendants. (Doc. 12).

With McMillan as the only defendant defending this suit, Allstate filed a Motion for Judgment on the Pleadings, which is currently before this Court, arguing that on the basis of the underlying complaint and the insurance policy, Allstate is entitled to judgment as a matter of law. (Doc. 14). McMillan first admits in his Memorandum of Law in Response to Plaintiff's Motion for Judgment on the Pleadings that "under the terms of the Allstate Homeowner's Policy issued to Aleka Key-Berthau, Allstate does not have a duty to defend or indemnify Lokeil Berthau, as his conduct constituted an intentional and criminal act under the policy." (Doc. 15 at 5). The only remaining dispute between the parties, then, is whether Allstate has a duty to defend Key-Berthau.

B. Insurance Policy Terms

Allstate issued Deluxe Homeowners Policy No. 901162226 to Key-Berthau, which is the policy at issue.² There are several provisions that are relevant to the insurance coverage dispute.

The provision providing for a duty to defend is the Family Liability Protection provision:

Subject to the terms, conditions and limitations of this policy, Allstate will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies, and is covered by this part of the policy.

We may investigate or settle any claim or suit for covered damages against an insured person. If an insured person is sued for these damages, we will provide a defense with counsel of our choice, even if the allegations are groundless, false or fraudulent. . . .

(Policy at 37). An “insured person” is defined as “you and, if a resident of your house: a) any relative; and b) any dependent person in your care.” (Policy at 17). “You” and “your” are defined as “the person named on the Policy Declarations as the insured and that person’s resident spouse.” (*Id.*) The policy also defines an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in bodily injury or property damage.” (Policy at 19). “Accident,” however, is not defined.

Finally, the policy also contains two relevant exclusions that narrow coverage. First, the policy contains an intentional/criminal act exclusion:

² Allstate initially attached a copy of the policy as Exhibit A to the Declaratory Judgment Complaint. (Doc. 1 Ex. A). However, the version attached only contained portions of the policy. A complete version was attached as Exhibit A to Plaintiff’s Motion for Judgment on the Pleadings (Doc. 14 Ex. A). Citations to provisions of the policy will be made directly to that exhibit. See, e.g., (Policy at 1).

We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if:

- a) such insured person lacks the mental capacity to govern his or her conduct;
- b) such bodily injury or property damage is of a different kind or degree than that intended or reasonably expected; or
- c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime.

(Policy at 37) (emphasis added). Second, the policy also contains a provision (hereinafter referred to as a “Joint Obligations” clause) that imputes any act or failure to act within the terms of the agreement to the other individuals who are considered “insured”:

The terms of this policy impose joint obligations on persons defined as an insured person. This means that the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person defined as an insured person.

(Policy at 20).

II. Jurisdiction and Legal Standard

A. Jurisdiction

Allstate instituted this action seeking a declaratory judgment under the Federal Declaratory Judgment Act, codified at 28 U.S.C. § 2201. This Court has subject matter jurisdiction under 28 U.S.C. § 1332(a)(1) since the parties are diverse and the amount in dispute exceeds \$75,000.

When a federal district court presides over a case grounded in diversity jurisdiction, the court must apply the choice-of-law rules of its forum state. Klaxon v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941); LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1071 (3d Cir. 1996). As there

is no dispute between the parties concerning which law applies here, this Court will apply Pennsylvania law.

B. Legal Standard

The court may only grant a motion under Federal Rule of Civil Procedure 12(c) if “the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.” Corestates Bank, N.A. v. Huls Am., Inc., 176 F.3d 187, 193 (3d Cir. 1999). In deciding a motion for judgment on the pleadings under Rule 12(c), the court uses the same standard as when deciding a motion to dismiss under Rule 12(b)(6). Nesmith v. Independence Blue Cross, 2004 WL 253524, at *3 (E.D. Pa. Feb. 10, 2004) (citing Constitution Bank v. DiMarco, 815 F. Supp. 154, 157 (E.D. Pa. 1993)). Thus, the motion will be granted only when it is certain that “no relief can be granted under any set of facts that could be proved.” Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 189 (3d Cir. 1998). The court must also accept as true all allegations in the complaint and view them in the light most favorable to the non-moving party. Consol. Rail Corp. v. Portlight, Inc., 188 F.3d 93, 94 (3d Cir. 1999).

III. Discussion

A. Parties’ Contentions

Allstate ultimately argues that it has no obligation to defend Key-Berthau in the underlying litigation. Allstate first contends that the intentionality of the underlying act that caused the injury here, the shooting committed by Lokeil, takes this incident outside the scope of “occurrence,” even for Key-Berthau. In the alternative, Allstate asserts that the intentional/criminal act exclusion precludes coverage for Key-Berthau, particularly since the

exclusion is triggered by intentional acts of “any insured person.” Finally, Allstate contends that the joint obligations clause of the policy, which imputes the acts of one insured against all others, imposes the intentional/criminal act exclusion on Key-Berthau due to Lokeil’s exclusion.

In response, McMillan generally argues that the policy does impose a duty to defend on Allstate for Key-Berthau. First, as to the definition of “occurrence,” McMillan argues that the inquiry into whether an act was intentional or negligent is made from the viewpoint of the defendant insured, not a third party. McMillan therefore argues that, despite Lokeil’s intentional conduct, the factual allegations against Key-Berthau are all based in negligence, which does fall within the scope of “occurrence.” McMillan also contends that the intentional/criminal act exclusion does not apply to Key-Berthau since, contrary to Allstate’s argument, the exclusion does not impute intentionality of one insured onto all others. As to the joint obligations clause, McMillan argues that its provisions are ambiguous as to whether it applies in this case, and the ambiguity should be construed in favor of the insured.

B. Analysis

As there are no issues of material fact remaining in the case, the only open issue is whether the insurance policy covers the claim against Key-Berthau in the underlying complaint. First, “[t]he interpretation of an insurance policy is a question of law” Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 897 (Pa. 2006) (citing 401 Fourth Street v. Investors Ins. Co., 879 A.2d 166, 170 (Pa. 2005)). Courts may therefore dispose of such cases on motions for judgment on the pleadings where the sole issue concerns the interpretation of the policy.

There are several well-recognized principles under Pennsylvania law that courts should utilize in interpreting the legal meaning of terms in an insurance policy. Those words in the policy that are of common usage should be “construed according to their natural, plain, and ordinary sense.” Kvaerner, 908 A.2d at 897.

Our purpose in interpreting insurance contracts is to ascertain the intent of the parties as manifested by the terms used in the written insurance policy. When the language of the policy is clear and unambiguous, we must give effect to that language. However, when a provision in the policy is ambiguous, the policy is to be construed in favor of the insured to further the contracts [sic] prime purpose of indemnification and against the insurer, as the insurer drafts the policy and controls coverage.

Donegal Mut. Ins. Co. v. Baumhammers, 938 A.2d 286, 290 (Pa. 2007) (internal citations and quotations omitted).

For purposes of interpreting the terms of insurance policies for a duty to defend and/or indemnify, the duty to defend is broader than the duty to indemnify. See USAA Cas. Ins. Co. v. Bateman, Civ. A. No. 07-3700, 2008 WL 4761718, at *4 (E.D. Pa. Oct. 30, 2008) (Baylson, J.).

Where the underlying complaint makes at least one allegation that falls within the scope of the policy’s coverage, the duty to defend is triggered, even where an insured is ultimately found to be not liable. See Gen. Accident Ins. Co. of Am. v. Allen, 692 A.2d 1089, 1095 (Pa. 1997) (“If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover.”).

In determining whether the underlying litigation falls within the scope of the insurer’s duty to defend, a court must examine only those factual allegations made within the “four

corners” of the underlying complaint. The duty can not be triggered by allegations outside of the complaint, including discovery responses produced in either the underlying litigation or the insurance dispute litigation. See Kvaerner, 908 A.2d at 896 (“[A]n insurer’s duty to defend and indemnify [must] be determined solely from the language of the complaint against the insured. . . . [A]n insurer’s duty to defend is triggered, if at all, by the factual averments contained in the complaint itself.”). Coverage is also not triggered by the skill of a plaintiff’s pleadings. Rather, courts must look only at those factual allegations in the complaint, not the legal claims, in considering whether a suit falls within the scope of the duty. Mutual Ben. Ins. Co. v. Haver, 725 A.2d 743, 745 (Pa. 1999) (“[T]he particular cause of action that a complainant pleads is not determinative of whether coverage has been triggered. Instead it is necessary to look at the factual allegations contained in the complaint.”).

1. Scope of the Term “Occurrence”

In determining whether there is a duty to defend, the first issue is whether the incident alleged in the underlying complaint comes within the scope of “occurrence” for purposes of the insurance policy. Allstate contends that the intentionality of the primary act here, Lokeil shooting McMillan, takes the underlying complaint outside the scope of an “occurrence,” even for Key-Berthau. However, such a ruling would plainly conflict with the Pennsylvania Supreme Court’s decision in Donegal Mut. Ins. Co. v. Baumhammers, 938 A.2d 286 (Pa. 2007).

In Baumhammers, the Pennsylvania Supreme Court considered whether the alleged negligence of the parents, which led to several murders by their son, came within the scope of “occurrence” for purposes of an insurance policy. The insurance policy dispute arose from the son’s shooting rampage, which resulted in the deaths of five individuals and severe injuries to

one other. Id. at 288. The one surviving victim and the representatives of the deceased filed suit in state court against the son and the parents; the plaintiffs alleged that the parents failed to provide adequate mental health treatment, failed to take away the son's pistol, and failed to notify authorities that their son was in possession of a pistol. Id. at 288-89. At the time of the incident, the parents had purchased a homeowner's insurance policy through Donegal; notably, the policy also covered the son since he resided in the parents' home. Id. at 289. The policy provided coverage for "claims brought against an insured for damages resulting from bodily injury caused by an 'occurrence,'" id., which was defined (similar to the Key-Berthau policy) as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in . . . [b]odily injury or [p]roperty damage," id. Donegal filed a declaratory judgment action in which it argued that it had no duty to defend or indemnify the parents for the lawsuit, as the son's intentional conduct brought the incident outside the scope of "occurrence."

The court first stated that the allegations of liability made against the parents were allegations of negligence and not intentional conduct. Id. at 291. While recognizing that intentional conduct did not come within the definition of "occurrence" after the court's decision in Gene's Restaurant Inc. v. Nationwide Ins. Co., 548 A.2d 246 (Pa. 1988), the court stated that "[o]ur conclusion in Gene's Restaurant . . . does not absolve an insurer of the duty to defend its insured when the complaint filed against the insured alleges that the intentional conduct of a third party was enabled by the negligence of the insured." 938 A.2d at 291. Focusing on the allegations made against the insured, the court held that "our case law requires Donegal to defend Parents against Plaintiffs' claims of negligence even where that alleged negligence may have led

to the intentional acts of a third party.” Id. at 292. From the perspective of the insured seeking the defense, “Plaintiffs’ injuries were caused by an event so unexpected, undesigned and fortuitous as to qualify as accidental within the terms of the policy.” Id. 293.

The Pennsylvania Supreme Court’s decision in Baumhammers is clearly applicable to the case at hand. McMillan has alleged that Lokeil, a third party, committed the intentional acts of assault and battery by firing his pistol at McMillan. However, McMillan’s underlying complaint also alleges that Key-Berthau, the insured whose conduct (as alleged) is at issue in this motion for judgment on the pleadings, acted negligently by providing Lokeil with a firearm and training him on how to use it. While Lokeil’s alleged act is certainly intentional, the inquiry for determining whether the complaint alleges an “occurrence” or “accident” is conducted from the perspective of the insured seeking a defense, rather than the insured who directly inflicted the injuries. As the Baumhammers case reflects, conducting this inquiry from the viewpoint of the insured who seeks the defense is appropriate even where the third party who allegedly committed the intentional act was also one of the insureds under the policy. See Baumhammers, 938 A.2d at 289 (“The policy covers Parents as well as any relative residing in the household. Baumhammers [the son] resided in his parents’ home at the time of the shooting incidents.”). Since the intentionality of Lokeil’s conduct does not taint the otherwise allegedly accidental nature of Key-Berthau’s indirect acts, the negligent supervision claim brought against Key-Berthau does constitute an “occurrence.”

2. Intentional Act Exclusion

While the factual allegations concerning Key-Berthau in the underlying complaint may constitute an “occurrence,” that does not end the analysis of the duty to defend for Key-Berthau’s

policy. Allstate argues that, even if the incident does amount to an “occurrence,” the intentional/criminal act exclusion still applies. As discussed above, the homeowner’s policy provides that:

We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if:

- a) such insured person lacks the mental capacity to govern his or her conduct;
- b) such bodily injury or property damage is of a different kind or degree than that intended or reasonably expected; or
- c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime.

(Policy at 37) (emphasis added). Allstate contends that the exclusion applies where the bodily injury or property damage results from the intentional acts of “any insured person,” not only Key-Berthau.

Such an argument was considered and accepted by the Pennsylvania Superior Court in its en banc decision of Donegal Mut. Ins. Co. v. Baumhammers, 893 A.2d 797, 818 (Pa. Super. 2006), rev’d in part on other grounds, 938 A.2d 286 (Pa. 2007). In that case, the court, on an appeal from a grant of summary judgment, analyzed both the homeowners insurance policy from Donegal, which was the policy subsequently considered on appeal by the Pennsylvania Supreme Court, and an umbrella policy from United Services Automobile Association (“USAA”), which was not later considered by the Pennsylvania Supreme Court. The USAA policy included two relevant exclusions. The first exclusion, similar to the one provided to Key-Berthau, precluded coverage where the bodily injury or property damage was “caused by the intentional or

purposeful acts of any insured.” Baumhammers, 893 A.2d at 805. The second exclusion precluded coverage for “[b]odily injury, personal injury or property damage arising out of a malicious or criminal act or omission by, or with either the knowledge or consent of, any insured regardless of whether such insured is actually charged with, or convicted of, a crime.” Id. The trial court granted summary judgment for USAA on the basis of one of the exclusions, holding that USAA did not have a duty to defend or indemnify the parents in any of the civil actions. Id. In the part of its opinion considering the USAA umbrella policy, the en banc Superior Court held that both exclusions applied, thereby precluding coverage for the parents.

Considering the second exclusion, the Baumhammers parents argued that it only applied to the son, and that the language in the exclusion, prohibiting coverage for malicious or criminal acts committed by “any insured,” did not prevent coverage for the parents. Id. at 818. After concluding that the language in the policy was clear and unambiguous, id., the court rejected the Baumhammer parents’ argument. “The fact that Parents did not engage in criminal behavior is immaterial because the USAA policy exclusion applies to criminal behavior of any insured. Since Baumhammers [the son] is an insured and the underlying claims do not contain sufficient, exact averments establishing how Baumhammers’ actions were not intentional and were not criminal, the exclusion applies.” Id.

As to the parents’ argument that this reading of the policy would be contrary to the expectations of the parties:

In the present case, the criminal act exclusion clearly states that the insurance policy does not apply to bodily or personal injury arising out of a malicious or criminal act of any insured whether or not such insured is convicted of a crime. Similarly, coverage is excluded for bodily or personal injury caused by the intentional or

purposeful act of any insured. The bodily and personal injuries suffered by Plaintiffs arose from the intentional, malicious, and criminal acts of an insured, Richard Baumhammers. The underlying complaints do not contain any in-depth factual assertions establishing that Baumhammers acted otherwise. As such, the exclusions apply. Furthermore, Parents cannot claim they reasonably expected that criminal conduct and intentional conduct would be covered because the exclusions clearly and unambiguously state that criminal conduct and intentional conduct by any insured is not covered under the policy.

Id. at 819. After rejecting several other arguments made by the Baumhammers parents and the underlying plaintiffs in that case, the court held that USAA did not have a duty to defend or indemnify the parents due to the two exclusions. Id. at 824.³

As the Pennsylvania Superior Court recognized, the inclusion of the words “any insured person” within the insurance policy, as opposed to “the insured person” or another phrase, is a distinction with an important difference. The Allstate policy that Key-Berthau purchased excludes coverage for either bodily injury or property damage that was intended by “any insured person,” similar to the exclusion considered by the Pennsylvania Superior Court in

³ See also Allstate Indem. Co. v. Batzig, 270 Fed. Appx. 154, 156-57 (3d Cir. 2008). In Batzig, the Third Circuit considered an appeal of the trial court’s grant of summary judgment for Allstate in two declaratory judgment actions. The underlying complaint alleged that three sons murdered another boy and also alleged that the sons’ parents were liable for negligent supervision. Id. at 155-56. Allstate filed the declaratory judgment actions, seeking a declaration that it was not obligated to defend or indemnify any of the parents who had homeowner’s insurance policies. Id. at 156. The homeowners policies, similar to the one at hand, included exclusions for “any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person.” Id. Relying on the Pennsylvania Superior Court’s decision in Baumhammers, the court held that the claims for negligent supervision were excluded from coverage: “It is undisputed that [the sons] are ‘insured person[s]’ within the meaning of the policies. Therefore, bodily injury or property damage resulting from their intentional acts is not covered. The fact that the Parents did not engage in any intentional behavior is irrelevant.” Id. at 156-57. Rejecting the parents’ argument that enforcing the exclusion would violate Pennsylvania public policy, the court affirmed the grant of summary judgment for Allstate in both cases. Id. at 157.

Baumhammers and identical to the exclusion considered by the Third Circuit in Batzig. While the analysis for “occurrence” considers the duty to defend/indemnify from the viewpoint of the insured rather than the individual who directly caused the injury, Baumhammers, 938 A.2d at 292, the Allstate exclusion inquires whether “any insured person” intended the bodily injury or property damage.

The Allstate policy defines “insured person” as “you and, if a resident of your house: a) any relative; and b) any dependent person in your care.” (Policy at 17). “You” is defined earlier as “the person named on the Policy Declarations as the insured and that person’s resident spouse.” (Id.) The Policy Declarations lists “Aleka Key-Berthau” at “1664 Benner Street, Phila PA 19149-3434” as the named insured. (Policy at 5). In response to the declaratory judgment complaint in the current case, Defendant Tarik McMillan admitted both that Lokeil Berthau is the son of Aleka Key-Berthau and that he resided in the same home. Therefore, under the policy, Lokeil is also an insured person.

In addition, the underlying complaint also clearly alleges that Lokeil committed intentional acts. McMillan alleged that Lokeil “took out a gun and fired nine (9) shots at Plaintiff, striking him seven times.” (Underlying Compl. ¶ 8). Later paragraphs also allege that the actions “were . . . malicious, intentional, gross, wanton and reckless.” (Underlying Compl. ¶ 14). While McMillan makes a brief reference to “grossly negligent acts” later on in the underlying complaint (Underlying Compl. ¶ 23), that reference is only a legal conclusion, and the factual allegations plainly consist of intentional conduct, rather than negligence.⁴

⁴ McMillan apparently concedes as much. In his response to Allstate’s Motion for Judgment on the Pleadings, McMillan acknowledges that the underlying complaint sufficiently alleges the intentionality of Lokeil so as to preclude coverage for the claims against Lokeil. (Def.

McMillan's sole argument concerns the text of the policy. McMillan argues that the intentional act exclusion clearly only applies to the insured who committed the intentional act. As the policy uses the word "any," McMillan contends that this indicates that the exclusion was meant to apply to only one person, rather than apply to "all" insured persons. McMillan also argues that the paragraphs following the exclusion suggest that the policy is only concerned with excluding coverage for the insured who committed the intentional act, rather than all insured persons. However, McMillan's argument is contrary to both the clear terms of the policy and prior opinions that have dealt with the issue. The intentional act exclusion clearly applies and precludes coverage for "bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person." (Policy at 37) (emphasis added). The following paragraphs that McMillan refers to relate to the insured person who intends the injury. However, they do not overcome the word "any" before insured person in the primary provision. Also, McMillan fails to offer any cases that have accepted his interpretive theory under Pennsylvania law.

On the basis of the factual allegations in the complaint, the intentional act exclusion of the Allstate policy precludes coverage for Key-Berthau. The underlying complaint alleges bodily injury that resulted from an intentional act of "any insured"—Lokeil. As in Baumhammers and Batzig, the inclusion of the word "any" effectively prevents coverage where one of the insured individuals falls within the exclusion. Because Lokeil's intentional conduct here falls within the

McMillan's Mem. Law Resp. Pl.'s Mot. J. on Pleadings at 5 n.1) ("Defendant, Tarik MicMillan [sic], concedes that under the terms of the Allstate Homeowner's Policy issued to Aleka Key-Berthau, Allstate does not have a duty to defend or indemnify Lokeil Berthau, as his conduct constituted an intentional and criminal act under the policy.").

exclusion, USAA is not obligated to defend or indemnify Key-Berthau in the underlying lawsuit, even where the allegations against her otherwise fall within the term “occurrence.”⁵

An appropriate order follows.

⁵ This Court need not consider any issues arising from Lokeil’s mental illness because mental illness is not alleged in the underlying complaint. As to the argument concerning the Joint Obligations clause, this Court need not address that issue due to the holdings made above.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ALLSTATE INSURANCE COMPANY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
ALEKA KEY-BERTHAU, LOKEIL BERTHAU, and	:	
TARIK McMILLAN,	:	
Defendants.	:	No. 2:08-cv-768

ORDER

AND NOW, this 19th day of December, 2008, for the reasons stated in the foregoing Memorandum, it is hereby ORDERED that

1. Plaintiff's Motion for Judgment on the Pleadings (Doc. 14) is GRANTED;
2. Judgment is entered in favor of Plaintiff and against Defendants; and
2. The Clerk shall mark this case as CLOSED.

BY THE COURT:

/s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.